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COASTAL ENERGY KBM SDN BHD v. GAPIMA SDN BHD

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
B [CIVIL APPEAL NO: W-02(NCVC)(W)-1795-09-2016]
5 MARCH 2018

CONTRACT: *Agreement – Logistic services – Providing warehousing and transportation of goods – Plaintiff issued various invoices for services rendered –*
C *Defendant's refusal to make payments due to dispute of invoices – Plaintiff detained conductors belonging to defendant to procure commitment from defendant to settle and make payments – Plaintiff instituted action to claim against defendant for certain sums – Whether plaintiff's invoices lacked sufficient supporting documents – Whether there should be a deduction of a certain sum from invoices issued by*
D *plaintiff – Whether trial judge's finding based on and supported by documentary evidence – Whether there was reason to disturb trial judge's findings*

CONTRACT: *Agreement – Logistic services – Providing warehousing and transportation of goods – Plaintiff issued various invoices for services rendered –*
E *Defendant's refusal to make payments due to dispute of invoices – Plaintiff detained conductors belonging to defendant to procure commitment from defendant to settle and make payments – Whether defendant suffered a loss of USD378,360 due to non-operation hours caused by detention of conductors – Whether detention of conductors illegal – Whether there was justification for detention of conductors –*
F *Whether plaintiff had right of general lien over conductors – Whether there was sufficient evidence to prove loss*

Pursuant to an agreement between the respondent ('plaintiff') and the appellant ('defendant'), the plaintiff agreed to provide to the defendant, logistic services, including warehousing and transportation of goods. Pursuant to the contract, the defendant stored some of its goods and
G inventory, particularly the 36 inches conductors ('conductors') at the premises of the plaintiff. These conductors were for use in the operation of the oil rig at Atwood Manta situated offshore of Terengganu, which was operated by the defendant. For the services rendered, the plaintiff issued various invoices to the defendant. These invoices were heavily disputed by
H the defendant, allegedly due to insufficient supporting documents for the invoices. Hence, the refusal by the defendant to make payments for the invoices. As a result, the plaintiff refused to allow the removal of the conductors from storage in the plaintiff's premises when the defendant made a request for the same. The plaintiff imposed, *inter alia,* the following
I condition before the defendant was allowed to remove the conductors from the storage of the plaintiff, which was that the defendant was to sign a letter containing a payment plan or schedule of payment ('the settlement letter') containing a waiver of the requirement for a work order. The defendant

contended that they succumbed to the plaintiff's exertion and signed the settlement letter. Upon receiving the settlement letter, the plaintiff released the conductors to the defendant. However, the conductors did not reach Atwood Manta on time for productions, resulting in the non-operation in Atwood Manta. The non-operation was allegedly due to the plaintiff's action in withholding the defendant's activity and/or operation at the defendant's work site *ie,* by locking the storage spaces which caused the non-performing time on the part of the defendant. The defendant contended that they had then suffered losses, when Petroliam Nasional Berhad ('Petronas'), the principal, deducted the sum of USD378,360 from the defendant's claim to Petronas. The defendant subsequently withdrew the settlement letter but the plaintiff rejected the defendant's withdrawal. The plaintiff instituted the present action to claim against the defendant the outstanding sum due and owed by the defendant. The defendant disputed the amount claimed. The defendant, in turn, counterclaimed against the plaintiff the amount of USD378,360, the sum which was not paid by Petronas to the defendant upon being demanded by way of defendant's invoices, as the loss incurred by them due to non-operation. The High Court allowed the plaintiff's claim for the sum of RM1,680,605.69 and dismissed the defendant's counterclaim. In this appeal against the decision of the High Court, the issues that arose were (i) whether the trial judge was correct in deducting only the sum of RM831,175.99 from the claim of the plaintiff in view of the list as in the attachment in Annexure A to the witness statement of DW2, which consisted of the list of the plaintiff's invoices which lacked sufficient supporting documents allegedly in the amount of RM1,286,407.20 ('the deduction'); (ii) whether the defendant failed to prove its loss of USD378,360 which was deducted from the payment due to the defendant from Petronas; and (iii) whether the trial judge was correct in refusing to award any compensation to the defendant when there was already a finding that there was illegal detention of the conductors by the plaintiff resulting in the non-operation at Atwood Manta.

Held (allowing appeal in part)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) Annexure A was the dispute on the invoices issued by the plaintiff. The defendant contended that the total amount which was disputed, amounted to RM1,286,407.30. The defendant submitted that the trial judge ought to have deducted this amount from the invoices issued, instead of RM831,175.99. However, it was unclear as to what the defendant's true challenge to the plaintiff's invoices were. Nowhere did it set out the quantification which totalled up to RM1,286,407.30. To deduct the sum of RM1,286,407,30 premised on Annexure A, was wholly unsafe in view of the fact that some of the disputes to the invoices listed in Annexure A were not challenges but requests for clarifications. Consequently, the trial judge made a finding that the total number of invoices with no supporting documents ought to be deducted from the plaintiff's claim. This finding by the trial judge was based on and

supported by the documentary evidence adduced and in accordance to the closing submission by the defendant before her. Accordingly, there was no reason to disturb the trial judge's findings in this respect. (paras 40-48)

(2) The defendant sought to rely on six documents (minutes of meeting, costs sheets, letter from Petronas, IADC Forms and departure reports, daily drilling reports) to prove the loss of the USD378,360 that it suffered based on the costs wasted for 30.5 non-productive hours in Atwood Manta as the conductors could not arrive within time, due to the detention of the same at the plaintiff's premises. All the six said documents shared the same characteristics in that they were contemporaneous, made by different parties, consistent with each other and consonant with surrounding circumstances. On the totality of evidence, all the abovementioned documents showed a *prima facie* case of the loss. There was a finding by the trial judge that there were six days of illegal detention by the plaintiff of the conductors. There was no justification for such detention and the plaintiff had no right of general lien over the conductors, Therefore, there must be consequential losses flowing directly and naturally from the wrongful act of the plaintiff. The six documents alluded to were sufficient to prove the loss by the defendant. In all probability, from the documentary evidence, the defendant suffered the loss of USD378,369 due to non-operation at the rig as a result of the delay in sending the conductors to Atwood Manta. The trial judge erred in failing to appreciate the sufficient evidence available to prove the loss of USD378,360. Thus, judgment was entered against the plaintiff. (paras 61-68)

Bahasa Malaysia *Headnotes*

Berikutan satu perjanjian antara responden ('plaintif') dan perayu ('defendan'), plaintif bersetuju menyediakan perkhidmatan logistik kepada defendan, termasuk pergudangan dan pengangkutan barang. Menurut kontrak, defendan menyimpan beberapa barangan dan inventorinya, khususnya konduktor-konduktor 36 inci ('konduktor-konduktor') di premis plaintif. Konduktor-konduktor ini digunakan untuk operasi pelantar minyak di Atwood Manta yang terletak di luar persisir Terengganu, yang dikendalikan oleh defendan. Untuk perkhidmatan yang diberikan, plaintif mengeluarkan beberapa invois kepada defendan. Invois-invois ini dipertikaikan defendan, atas dakwaan dokumen sokongan yang tidak mencukupi untuk invois-invois itu. Akibatnya, plaintif enggan membenarkan pemindahan konduktor dari simpanan premis plaintif apabila defendan membuat permintaan sedemikian. Plaintif mengenakan, antara lain, syarat sebelum defendan dibenarkan memindah konduktor-konduktor dari simpanan plaintif, iaitu defendan perlu menandatangani surat yang mengandungi rancangan atau jadual pembayaran ('surat penyelesaian') yang mengandungi pengecualian keperluan arahan kerja. Defendan menghujahkan

telah menunduk pada paksaan plaintif dan menandatangani surat penyelesaian itu. Apabila menerima surat penyelesaian, plaintif melepaskan konduktor-konduktor kepada defendan. Tetapi, konduktor-konduktor itu tidak sempat sampai ke Atwood Manta pada masa yang ditetapkan untuk pengeluaran, mengakibatkan tiada operasi dijalankan di Atwood Manta. Ketiadaan operasi didakwa disebabkan tindakan plaintif menangguhkan aktiviti dan/atau operasi defendan dan/atau operasi tempat kerja defendan iaitu dengan penguncian ruang setor yang menyebabkan masa tidak berbayar pihak defendan. Defendan menghujahkan mengalami kerugian, apabila Petroliam Nasional Berhad ('Petronas'), memotong jumlah USD378,360 daripada tuntutan defendan kepada Petronas. Defendan seterusnya menarik balik surat penyelesaian tetapi plaintif menolak penarikan balik defendan. Plaintif memulakan guaman ini untuk menuntut terhadap defendan jumlah tertunggak yang terhutang oleh defendan. Defendan mempertikaikan jumlah yang dituntut. Defendan juga membuat tuntutan balas terhadap plaintif untuk jumlah USD378,360 iaitu jumlah yang tidak dibayar oleh Petronas kepada defendan apabila diminta melalui invois-invois defendan, sebagai kerugian yang ditanggung akibat ketiadaan operasi. Mahkamah Tinggi membenarkan tuntutan plaintif untuk jumlah RM1,680,605.69 dan menolak tuntutan balas defendan. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, isu-isu yang timbul adalah (i) sama ada hakim bicara betul apabila hanya menolak jumlah RM831,175.99 daripada tuntutan plaintif memandangkan senarai yang dilampirkan Lampiran A kepada kenyataan saksi DW2, mengandungi senarai invois-invois plaintif yang tidak mempunyai dokumen sokongan mencukupi yang didakwa dalam jumlah RM1,286,407.20 ('penolakan'); (ii) sama ada defendan gagal membuktikan kerugian USD378,360 yang ditolak daripada pembayaran yang perlu dibuat kepada defendan daripada Petronas; dan (iii) sama ada hakim bicara betul dalam keengganan memberikan award pampasan kepada defendan walaupun diputuskan terdapat penahanan haram konduktor-konduktor oleh plaintif yang telah mengakibatkan ketiadaan operasi di Atwood Manta.

Diputuskan (membenarkan sebahagian rayuan)

Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Lampiran A adalah pertikaian invois-invois yang dikeluarkan plaintif. Defendan menghujahkan bahawa jumlah keseluruhan yang dipertikaikan, ialah RM1,286,407.30. Defendan menghujahkan hakim bicara harus menolak jumlah itu daripada invois-invois yang dikeluarkan dan bukan RM831,175.99. Walau bagaimanapun, tidak jelas apakah bantahan sebenar defendan terhadap invois-invois plaintif. Tiada bentangan di mana-mana berkenaan kuantifikasi berjumlah RM1,286,4970. Tidak selamat sama sekali untuk menolak jumlah RM1,286,497.39 berlandaskan Lampiran A, memandangkan beberapa pertikaian terhadap invois-invois yang disenaraikan dalam Lampiran A bukan bantahan-bantahan tetapi permintaan untuk penjelasan. Oleh yang

demikian, hakim bicara membuat dapatan bahawa bilangan invois tanpa dokumen sokongan harus ditolak daripada tuntutan plaintif. Dapatan hakim bicara berdasarkan dan disokong oleh keterangan dokumentari yang dikemukakan dan menurut hujahan penutupan oleh defendan. Sewajarnya, tiada alasan untuk mengganggu dapatan hakim bicara berkenaan isu ini.

(2) Defendan menuntut untuk bergantung pada enam dokumen (minit mesyuarat, kos kertas, surat dari Petronas, Borang- Borang IADX dan laporan pelepasan, laporan harian penggerudian) untuk membuktikan kerugian USD378,360 yang dialaminya berdasarkan kos-kos untuk 30.5 jam tidak beroperasi di Atwood Manta kerana konduktor-konduktor tidak sampai dalam tempoh masa yang ditetapkan, kerana telah ditahan di premis plaintif. Keenam-enam dokumen tersebut berkongsi ciri-ciri yang sama kerana dokumen-dokumen tersebut adalah semasa, dibuat oleh pihak-pihak berbeza, konsisten antara satu sama lain dan konsonan dengan keadaan sekitar. Atas keseluruhan bukti, dokumen-dokumen tersebut menunjukkan kes *prima facie* kerugian. Hakim bicara mendapati plaintif telah menahan konduktor-konduktor itu secara haram selama enam hari. Tiada justifikasi untuk penahanan itu dan plaintif tidak mempunyai hak lien am ke atas konduktor-konduktor itu. Oleh itu, pasti ada kerugian berbangkit yang mengalir terus dan secara semula jadi daripada tindakan salah plaintif. Keenam-enam dokumen tersebut yang dirujuk adalah mencukupi untuk membuktikan kerugian oleh defendan. Dalam segala kebarangkalian, daripada keterangan dokumentari, defendan mengalami kerugian USD378,369 disebabkan tiada operasi di pelantar akibat kelewatan dalam menghantar konduktor-konduktor ke Atwood Manta. Hakim bicara terkhilaf apabila gagal menghargai keterangan mencukupi yang dikemukakan untuk membuktikan kerugian USD378,360. Oleh itu, penghakiman dimasukkan terhadap plaintif.

Case(s) referred to:

Chai Kah Sim v. Ishak Saad [1986] 1 CLJ 537; [1986] CLJ (Rep) 80 SC ***(refd)***

Jeremiah v. Lee Yew Kwai [1965] 1 LNS 65 PC ***(refd)***

Nanyang Union Sdn Bhd v. Gloveline Industries (M) Sdn Bhd [2006] 1 CLJ 873 CA ***(refd)***

RHB Bank Bhd v. Treasure Island Resorts Sdn Bhd & Ors [2002] 4 CLJ 773 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 32(1)(b), 73A(2)

For the appellant - Yap Boon Hau & Tan Eng Keat; M/s Mah-Kamariyah & Philip Koh
For the respondent - Christopher Arun, Kow Kean Fatt & Shivani Sothirachagan; M/s Ariff Rozhan & Co

[Editor's note: For the High Court judgment, please see Gapima Sdn Bhd v. Coastal Energy KBM Sdn Bhd [2016] 1 LNS 1326 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] The appeal before us is against the decision of the learned High Court Judge in:

(i) allowing the respondent's (plaintiff's in the High Court) claim for the sum of RM1,680,605.69 with an interest of 5% per annum from 17 September 2014 with costs of RM35,000; and

(ii) dismissing the appellant's (defendant's in the High Court) counterclaim with costs of RM15,000.

[2] On 9 May 2017, after having heard learned counsel for the plaintiff and the defendant and perusing through the records of appeal, for the reasons that follow, we allow the appeal in part in respect of the counterclaim with costs of RM25,000 here and below subject to allocatur and deposit refunded.

[3] Parties shall be referred to as they were, in the High Court.

Background

[4] Pursuant to an agreement entered into between the plaintiff and the defendant, the plaintiff agreed to provide to the defendant, logistic services, including warehousing and transportation of goods.

[5] The terms of the agreement are contained in:

(i) the service order (p. 196 of CCB vol. II);

(ii) standard terms and conditions for purchase/service order (pp. 229-236 of CCB vol. II).

(collectively known as "the contract")

[6] Pursuant to the contract, the defendant stored some of its goods and inventory, particularly the 36 inches conductors (conductors) at the premises of the plaintiff. These conductors were for use in the operation of the oil rig at Atwood Manta situated offshore of Terengganu, which was operated by the defendant.

[7] For the services rendered, the plaintiff issued various invoices to the defendant. These invoices were heavily disputed by the defendant, allegedly due to insufficient supporting documents for the invoices. Hence, the refusal by the defendant to make payments for the invoices.

[8] As a result, the plaintiff refused to allow the removal of the conductors from storage in the plaintiff's premises on 21 March 2014, when the defendant made a request for the same. The conductors were detained by the plaintiff in its premises. (Refer to p. 207 of the CCB vol. II).

[9] The detention of the conductors by the plaintiff was to procure a commitment from the defendant to settle and make payments for the invoices (refer to p. 65 of CCB vol. I). The plaintiff imposed the following conditions before the defendant was allowed to remove the conductors from the storage of the plaintiff:

(i) the defendant is to pay a sum of RM700,635.09 on or before 24 March 2014 (p. 224 of CCB vol. II); and

(ii) the defendant is to sign a letter dated 26 March 2014 containing a payment plan or schedule of payment (hereinafter referred to as "the settlement letter") containing a waiver of the requirement for a work order (refer to pp. 227-228 of CCB vol. II).

[10] The defendant contend that they succumbed to the plaintiff's exertion and signed the settlement letter, as they were left with no choice and needed the conductors for their operation at Atwood Manta. In addition, the defendant would have to bear the costs of non-operation per day at Atwood Manta which can be quite a sum.

[11] Upon receiving the settlement letter on 27 March 2014, the plaintiff released the conductors to the defendant (pp. 221-222 of CCB vol. I).

[12] The defendant received the 18 joint conductors and loaded to a vessel on "MP Valour" on 28 March 2014 (p. 242 of CCB vol. II) to depart from the Kemaman Port on the same date and reached Atwood Manta on 29 March 2014 (p. 269 of CCB vol. II).

[13] The conductors did not reach Atwood Manta in time for productions on 28 March 2014 and part of 29 March 2014 (See p. 269 of CCB vol. II), which resulted in the non-operation in Atwood Manta. The non-operation was allegedly due to the plaintiff's action in withholding the defendant's activity and/or operation at the defendant's work site ie, by locking the storage spaces which caused the non-performing time on the part of the defendant. As a result, the defendant contended that they suffered losses, when Petroliam Nasional Berhad (Petronas), the principal, deducted the sum of USD378,360 from the defendant's claim to Petronas.

[14] By a letter dated 16 April 2014, the defendant withdrew the settlement letter. However, the plaintiff rejected the defendant's withdrawal *vide* its letter dated 22 April 2014.

[15] The plaintiff instituted the present action to claim against the defendant the sum of RM2,511,781.68 being the outstanding sum due and owed by the defendant. The defendant disputed the amount claimed in the form of Annexure A of the witness statement of DW2, for the total sum of RM1,286,407.30 (See pp. 180-183 of CCB vol. II).

[16] The defendant in turn, in its re-amended defence, counterclaimed against the plaintiff for the following:

(i) USD1,710,071.45 and USD1,075,235.08 owed to the defendant's various vendors;

(ii) USD378,360 for the sum which was not paid by Petronas to the defendant upon being demanded by way of defendant's invoices, as the loss incurred by them due to non-operation and general damages to be assessed (p. 54 of CCB vol. I); and

(iii) For general damages to be assessed.

[17] The defendant later abandoned the claim of RM1,075,235.08.

The Plaintiff's Case

[18] The defendant never disputed the services provided by the plaintiff within 14 days after receiving the invoices. The defendant failed to make payment within 45 days, a credit term provided by the plaintiff to the defendant.

[19] The claim by the plaintiff is premised upon the settlement letter dated 26 March 2014 which was executed and signed by the defendant after several discussions between the plaintiff and the defendant. The plaintiff alleges that the defendant had agreed to make such payment by installments to settle the amount outstanding. It is the plaintiff's case that the defendant is bound by the terms in the settlement letter dated 26 March 2014 and is estopped from denying the commitment to make the payment as contained in the same.

[20] As for the counterclaim by the defendant, the plaintiff alleges that the calculation for the claim of damages due to loss of time by the defendant are full of contradictions and that it was a tactic to delay making payment for the services which has been rendered by the plaintiff. There is the oral evidence from the defendant's witness, Encik Mohd Salwani bin Mohamad (DW 2) who claimed that Petronas (having audited the defendant's account) had deducted USD14,974,269 from the claim by the defendant. The USD214,974,269 consist of USD378,360 claimed herein. The reliance by the defendant on the Audit Report as evidence of loss of USD378,360 is misplaced as it is merely a statement from the defendant to the RSC Audit Committee. It is based on a figure given by the defendant to Petronas and recorded in the minutes of the meeting on 22 December 2014 between Petronas and the defendant. The plaintiff did not have the opportunity to rebut the allegations made by the defendant at this meeting. The defendant failed to submit or produced any invoice or statement to show that it had indeed suffered the loss of the amount.

[21] The pleaded loss of 216 hours allegedly incurred by the defendant is disputed by the plaintiff and was caused by the failure on the part of the defendant, its workers, servants or agents in carrying out its duty with care

and reasonable skill. No evidence was led by the defendant at trial to support the allegation that this loss is due to the detention of the conductors by the plaintiff.

[22] The plaintiff alleges that its action in detaining the conductors temporarily in Kuantan is valid and is in accordance with law. The plaintiff claims it has a general lien on the conductors and hence is merely exercising its vested right in law in claiming the sums owed by the defendant.

The Defendant's Case

[23] The various invoices issued by the plaintiff were disputed from the outset as they were not supported by sufficient supporting documents. The allegation that the services provided were never disputed by the defendant within 14 days upon receiving the invoices was without merits, as the defendant had on numerous occasions, disputed and requested for the supporting documents to the various invoices. The plaintiff failed to provide the same, hence the 14 days time line is inapplicable. In any event the 14 days time line had never been imposed on the defendant before.

[24] The 45 days period of credit time limit is only applicable after the defendant received undisputed invoices with sufficient supporting documents as stated in the various service order, purchase order and standard terms and conditions for purchase/service order.

[25] The settlement letter was executed by the defendant under duress. The defendant was left with no choice but to execute the same as the plaintiff had withheld the work activities and/or operations at the defendant's work site by locking the spaces which were rented by the defendant from the plaintiff.

The Findings By The Learned High Court Judge

[26] The learned High Court Judge found that the settlement letter dated 26 March 2014 is voidable as it was procured by duress and coercion. Clause 1 of the settlement letter dispenses with the requirement as contained in the standard terms and conditions of the contract, that all invoices must be supported by the defendant's work order and/or service order. It also dispenses with the defendant's contractual right to verify the invoices before making any payment to the plaintiff, which the learned trial judge found to be unreasonable.

[27] The term of the "14 days" period to challenge invoices which was inserted at the bottom of the invoices issued by the plaintiff is in contradiction with cls. 7, 20 and 26 of the standard terms and conditions of the contract. In any event, the 14 days period was never agreed by the defendant.

[28] Most of the invoices which were issued out by the plaintiff were not supported by any valid work order, third party invoices, delivery order, service order or the rates were not agreed to, by the defendant.

[29] As for the general lien raised by the plaintiff in detaining the conductors, the learned trial judge found that the plaintiff is not entitled to invoke a general lien to detain the conductors as security, as there is no express contract between the plaintiff and the defendant to give rise to such a lien.

[30] The plaintiff also has no right to rely on the "general lien" as provided under cl. 4.3 of the Federation of Malaysia Freight Forwarders General Standard Trading Conditions ("FMFF Conditions") over the defendant's conductors, as the FMFF conditions only applied to "accredited members". The learned trial judge found that there is no evidence that the plaintiff is an accredited member of the FMFF to allow it to invoke the FMFF Conditions in its business transactions with its customers, including the defendant.

[31] The defendant needed all the 18 conductors for its production at the oil rig. It could not start with anything less than 18 conductors. The last four yellow conductors were only delivered on 28 March 2014 at 3.30pm.

[32] The delay of the vessel in arriving at Atwood Manta with the required conductors were caused by the plaintiff's act of withholding the conductors. There were six days of illegal detention of the conductors by the plaintiff.

[33] Consequently, there were non-operational hours at Atwood Manta on 28 March 2014 and 29 March 2014.

[34] The defendant failed to prove its counterclaim.

The issues

[35] The following are the issues that were before us:

(i) whether the learned trial judge was right in deducting only the sum of RM831,175.99 from the claim of the plaintiff in view of the list as in the attachment in Annexure A to the witness statement of DW2 which consisted of the list of the plaintiff's invoices which lack sufficient supporting documents allegedly in the amount of RM1,286,407.20 (the deduction);

(ii) whether the defendant failed to prove its loss of USD378,360 which was deducted from the payment due to the defendant from Petronas (the counterclaim);

(iii) whether the learned trial judge was correct in refusing to award any compensation to the defendant when there was already a finding that there was illegal detention of the conductors by the plaintiff which resulted in the non-operation at Atwood Manta (the claim for general damages).

Our Decision

The First Issue: The Deduction

[36] The claim by the plaintiff against the defendant is for RM2,511,781.68 as being the outstanding invoices issued.

[37] It is trite that the plaintiff has to prove its claim for services rendered against the defendant. The defendant does not deny that they have to pay for the invoices, provided they are supported by sufficient documents. The invoices issued by the plaintiff were lacking in supporting documents. Hence, the defendant contends that there should be a deduction of RM1,286,407.20 from the invoices issued by the plaintiff. The learned trial judge in her judgment, only deducted the amount of RM831,175.99 from the claim of the plaintiff.

[38] It has been shown at trial that the following crucial supporting documents were absent in some of the invoices issued by the plaintiff, *ie*,:

(i) work order;

(ii) service order;

(iii) third party's invoices;

(iv) delivery order

[39] The above documents are crucial as it will prove that the services were requested by the defendant, the rates have been agreed and the works were performed by the plaintiff.

> 40. "Annexure A" is the dispute on the invoices issued by the plaintiff (See pages 180-183 0f CCB Volume I). The defendant contends that the total amount which is disputed, amounts to RM1,286,407.30. The defendant submits that the learned trial Judge ought to have deducted this amount from the invoices issued, instead of RM831,175.99.

[40] However, when PW4 was cross examined on "Annexure A", the cross examination by the defendant's counsel on PW4 was not directed to any specific item or individual invoice, but merely a general challenge that the invoices issued by the plaintiff were disputed. This can be seen in the notes of proceedings, when PW4 was cross examined on "Annexure A" as follows:

> DC: Attachment A yes. I put to you that the defendant had raised various issues on your invoices in the attachment, are you aware of those challenges in the attachment? Are you aware first of all Encik Khairy? Are you aware that since the beginning of this case the defendant has raised challenges to various invoices and he attached a list of challenges in attachment A are you aware of this?
>
> PW4: I aware of this after months defendant receiving our invoice.

[41] Thus, the submission by the defendant, that PW4 was unable to provide any satisfactory answer to the challenges raised with regards to Annexure A, given the way Annexure A was put to PW4, was clearly misconceived.

[42] In addition, there seemed to be a concession by the defendant in its closing submission before the learned trial judge, when counsel for the defendant provided an alternative submission that:

> ... in the best case scenario, the Respondent (defendant) could only recover the sum of RM1,680,605.69 in the absence of counterclaim. The original claim was RM2,511,781.68 but this amount must be deducted from RM625,320.92 (invoices without valid work order), RM95,497.07 (invoices without third party invoices), RM12,108.00 (invoices without delivery order), RM75,750.00 (invoices without service order), RM21,500.00 (invoices where rate not agreed). All these amounts were specifically put to the witnesses of the Respondent but they could not answer to the dispute.

[43] In the grounds of judgment of the learned trial judge, (at para. 41 at p. 33 of the record of appeal part A vol. I (1), the learned trial judge had considered the various invoices where there were no supporting documents and summarised it at para. 43 of the same where she concluded that the amount in the plaintiff's invoices which could not be proved are as follows:

(i) RM626,320.92 ie, invoices without valid work orders;

(ii) RM95,497.07 ie, invoices without third party invoices;

(iii) RM12,108 ie, invoices without delivery orders;

(iv) RM75,750 ie, invoices without service orders;

(v) RM21,500 ie, invoices where rates were not agreed.

[44] The learned trial judge found that the items mentioned in para (i) until (v) at para. 43 above, were agreed by the witnesses of the plaintiff (ie, PW1, PW3 and PW4) as being lacking in either the following:

(i) without valid work orders;

(ii) without third party invoices;

(iii) without delivery orders;

(iv) without service orders; or

(v) invoices where the rates were not agreed.

The learned trial judge considered the above by referring to exh. D2.

[45] As for the other invoices, it is unclear as to what the defendant's true challenge to the plaintiff's invoices are. A perusal of "Annexure A" show that, nowhere does it set out the quantification which totalled up to RM1,286,407.30.

[46] In addition, to deduct the sum of RM1,286,407.30 premised on "Annexure A" is wholly unsafe in view of the fact that some of the disputes to the invoices listed in "Annexure A" are not challenges but are requests for clarifications. For example:

(i) Invoice No. INVKM130000785:

"Checking with Gapima on the month/year for open yard to create addition S/O"

(ii) Invoice No. INVHQ130000813:

"Item 7 Kindly clarify on this costs"

(iii) Invoice No. INVKM40000161:

"Why the same crew been signed on/off?"

(iv) Invoice No. INVJB140000200:

"Approver 1) clarify between item 1 & 3;

(a) why item 6 is being charged;

(b) why there are 2 launches."

(v) Invoice No. INVKM140000677:

"Kindly provide the breakdown of usage."

(vi) Invoice No. DNKM140000105:

"Refer the third party invoice - kindly advise the size of the basket."

[47] Hence, for the other invoices (not mentioned in para. 43(i) to (v) above), there has been no definite dispute or challenge mounted by the defendant.

[48] Consequently, the learned trial judge made a finding that the total number of invoices with no supporting documents as stated in para. 43(i) to (v) above ought to be deducted from the plaintiff's claim of RM2,511,781.68. This finding by the learned trial judge was based on and supported by the documentary evidence adduced and in accordance to the closing submission by the defendant before her. Accordingly, we find it difficult to interfere with the learned trial judge's findings on the deductions that she had made to the claim by the plaintiff.

Refer to:

(a) *RHB Bank Bhd v. Treasure Island Resorts Sdn Bhd & Ors* [2002] 4 CLJ 773 (CA);

(b) *Chai Kah Sim v. Ishak Saad* [1986] 1 CLJ 537; [1986] CLJ (Rep) 80; [1986] 2 MLJ 132 (SC);

(c) *Jeremiah v. Lee Yew Kwai* [1965] 1 LNS 65; [1966] 1 MLJ (PC). A

Hence we find no reason to disturb the learned trial judge's findings in this respect.

Second Issue: On The Counter Claim

[49] The defendant claims that it suffered a loss of USD378,360 which is B based on the costs wasted for 30.5 of non-productive hours in Atwood Manta as the conductors could not arrive within time, due to the detention of the same at the plaintiff's premises.

[50] It was accepted by the learned trial judge and she made a finding that C the detention of the conductors by the plaintiff had caused the delay in 30.5 non-productive hours. The learned trial judge held that the plaintiff failed to prove a general lien on the conductors, as it was not provided in the contract and neither can the plaintiff rely on the FMFF conditions as the plaintiff was never an accredited member. The plaintiff was aware that those conductors were needed for the operation in the oil rig. However, the learned trial judge D held that the documents adduced by the defendant at trial were insufficient to prove the loss of USD378,360 as claimed. Whether the learned trial judge was right in deciding so.

[51] The defendant sought to rely on the following six documents to prove E this loss:

(i) Firstly, is the Vessel Departure Report, a document in CCB vol. II at p. 293, which recorded that the vessel that collected the 18 joint conductors departed from Kemaman Port on 28 March 2014 at 4pm. This is to show how the plaintiff derives the 30.5 non-productive hours. F

(ii) Secondly, is the daily drilling reports, prepared by the defendant which can be found at pp. 240 and 241 of CCB vol. II. This is the daily drilling reports prepared by the defendant on 28 March 2014 and 29 March 2014. 28 March 2014 is the date where the defendant was supposed to have the operation, but could not, due to non-availability of the G conductors. The operation breakdown on 28 March 2014 amounts to a total of 23 hours.

The daily drilling report on 29 March 2014 at p. 241 of CCB vol. II, shows that there was a rig wait of 7.5 hours.

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If we peruse these documents there was a total wait of 30.5 hours (23 hours + 7.5 hours). This is the total loss that is calculated by the defendant which is the total hour of non-production.

The learned trial judge considered these daily drilling reports. However she was of the view that since they were not signed, she would not give I weight to these documents.

(iii) The third document, the IADC Daily Drilling Report Forms (IADC Forms), is consistent with all the figures above, and is found at pp. 253 and 257 of the CCB vol. II. The IADC Forms are generated by computer, and it was made in the ordinary course of business. These reports contain signatures of the representative of the defendant ie, the operator of the oil rig and the signature of the contractor ie, the owner of the oil rig which was hired by the defendant to serve the needs of Petronas, the employer. At p. 254 is the total rig wait.

(iv) As for the costs, this is found at pp. 243-244 of CCB vol. II, which are the daily costs sheets which set out the daily costs of operation on the oil rig at p. 243. The total figure is at p. 244 of the same. Total costs on 28 March 2014 is stated as USD299,573 and on 29 March 2014 is USD292,061. These figures were corroborated by the subsequent audit committee of Petronas. The learned trial judge did not consider these cost sheets in her grounds.

(v) Minutes of the meeting held on 22 December 2014 with Petronas which recorded that the costs of waiting for the conductors was determined at USD378,360 (Refer to pp. 260-261 of CCB vol. II) (hereinafter referred to as "the minutes");

(vi) Letter dated 26 February 2015 from Petronas stating, amongst others, USD378,360 was identified as "non reimbursable". This was the sum which is non recoverable from Petronas (Refer to pp. 262-263 of CCB vol. II) (hereinafter referred to as "the letter from Petronas").

[52] Therefore:

(i) the total loss on 28 March 2014 was USD299,673 x 23/24 = USD287,090.79.

(ii) the total loss on 29 March 2014 was USD292,061 x 7.5/24 = USD91,269.06.

Hence the total loss for the rig wait was USD378,360.

The figure is confirmed by the audit committee meeting in Petronas *vide* the Minutes. The persons who attended the meeting were from Petronas and also from the defendant, Mohd Salwani Mohamad (DW2), who testified in court. In that meeting it was recorded that there was a total amount of non-reimbursable (NR) sum due to 30.5 hours of non-production. This was confirmed and agreed upon in this meeting (refer to item 3.3 at pp. 260 of CCB vol. II).

[53] The letter from Petronas confirms that having completed the audit review of the quarterly accounts, they found the three major categories of non-reimbursable sum which totalled to USD14,974,269. Out of this total amount, item no 4 is relevant for our purpose here, which recorded the sum of USD378,360 (refer to p. 263 of CCB Volume II) as non-reimbursable.

Hence the amount of USD378,360 is consistent from the minutes of the meeting and the letter which shows the total hours of non-production and the costs involved.

[54] The defendant made a claim to Petronas for the amount of USD185,014,395 (refer to p. 266 of CCB vol. II). Out of this, RM378,360.00, amongst others, was subsequently deducted by Petronas from the defendant's claim.

[55] The six pieces of documentary evidence as mentioned in para. 51 above, were presented and produced before the High Court but the learned trial judge only considered 2, ie, the minutes of the Petronas Meeting and the daily drilling reports. The minutes were not accepted as documentary proof as the learned trial judge said that no witness from Petronas was called to confirm the same. The daily drilling report was not accepted by the court as it was not signed by an authorised rig manager or supervisor. Further there was no production of invoices or other supporting documents to show the loss of such amount.

[56] However, we are of the view that the learned trial judge erred in failing to accept the minutes, the letter from Petronas and the IADC Forms.

[57] The learned trial judge considered the minutes but rejected it, as the Petronas officer was not called and the figures were provided by the defendant to Petronas. It is to be noted that the original minutes of the meeting were tendered in court. DW2, the financial controller of the defendant who was present at the meeting, came to court and explained how that figure came about because the costs were generated internally. Petronas did the audit and DW2 came to explain how these costs came about. At the trial, the original minutes and the letter from Petronas were produced in court and there was no objection from counsel for the plaintiff and the minutes were put into Part B documents. (refer to notes of proceedings at p. 100 of CCB vol. I). Therefore, there appeared to be no legal basis for the learned trial judge to reject the use of the minutes of the meeting as documentary proof of the loss.

[58] The learned trial judge referred to the daily drilling reports at pp. 240 and 241 of CCB vol. II annexed to the invoice at p. 239 of CCB vol. II. In addition, the defendant had produced the IADC Forms signed by the operator's representative and Toolpusher at pp. 254 and 257 of CCB vol. II which corroborate the daily drilling reports in material aspects. The daily drilling reports and the IADC Forms are documents which recorded the activities at Atwood Manta. It is proof of the total number of non-productive hours at Atwood Manta. These are documents prepared in the ordinary course of business and are admissible under s. 32(1) (b) and s. 73A(2) of the Evidence Act 1950. The learned trial judge had already made a finding that

there was an operational shut down of the defendant's operations, although there was no total shut down of the oil rig of the defendant (para. 73 of her grounds). Hence she ought to have accepted the fact sought to be proved by the daily drilling reports and the IADC Forms. The fact that the conductors only reached Atwood Manta on 29 March 2014 is proved by the daily drilling reports and corroborated by the departure report of the Vessel, as well as the IADC forms.

[59] There was evidence that Petronas had deducted the amount from the defendant's claim. Although counsel for the plaintiff challenged that RM378,360 was deducted by Petronas, DW2, who attended the meeting with Petronas, confirmed in cross examination on what was discussed at the meeting. In addition, the letter from Petronas stated expressly that this amount was deducted by Petronas (p. 173 CCB Volume I). DW2 would have personal knowledge of the matter, ie, that the amount was deducted by Petronas. Therefore, in the circumstances, there was no necessity to call the Petronas officer to confirm the minutes.

[60] The learned trial judge held that the figures of the loss "were given by the defendant to Petronas", as being one of the reason why she could not accept it as evidence. However, such findings by the learned trial judge was without regard to the costs sheet found at p. 244 of CCB vol. II. The learned trial judge failed to consider that the amount was accepted after an audit done by Petronas.

[61] All the six documents (minutes, costs sheets, letter from Petronas, IADC Forms and departure reports, daily drilling reports) shared the same characteristics in that they are contemporaneous, made by different parties, consistent with each other and consonant with surrounding circumstances.

[62] On the finding of the learned trial judge that there were no invoices and other supporting documents to prove the loss of the defendant, there was evidence of a debit note issued by the defendant to the plaintiff in respect of the losses arising from the non-operation at Atwood Manta in Malaysian Ringgit (p. 239 of CCB vol. II). The loss is in the form of a deduction by Petronas from the defendant's claim. Hence there is no legal requirement to issue an invoice before an action is sustainable. This is proved by the letter from Petronas that the sum is non-reimbursable and also from the evidence of DW2 that the sum was deducted.

[63] Therefore, on the totality of evidence, all the abovementioned documents show a *prima facie* case of the loss. The learned trial judge only referred to two (minutes and daily drilling reports) out of six documents and ignored the four admitted documents which prove the defendant's case. The figures or entries in the daily drilling reports is consistent with IADC Forms which had been signed by the contractor and the owner. The request to

remove the conductors was made on 21 March 2014 but it was only released on 27 March 2014. There was a finding by the learned trial judge that there were six days of illegal detention by the plaintiff of the conductors (paras. 58 and 59 of the grounds of judgment). There was no justification for such detention and the plaintiff has no right of general lien over the conductors. Therefore, there must be consequential losses flowing directly and naturally from the wrongful act of the plaintiff. Although there is no direct evidence from Petronas on the amount of the deduction, the six documents as alluded to, are sufficient to prove the loss by the defendant. In the Court of Appeal case of *Nanyang Union Sdn Bhd v. Gloveline Industries (M) Sdn Bhd* [2006] 1 CLJ 873; [2006] 2 MLJ at pp. 492-493, the plaintiff therein sought to rely on the oral testimony of Encik Ridwan to prove the breach, whose evidence was not supported by documentary proof, such as records of the percentage of rejection of the gloves. Encik Ridwan's evidence was also based on what had been informed to him by Dr Shukri from Rubber Research Institute and Amer Hariri, a foreign Technical Director whom the defendant had to employ. Neither of these men had been called, which meant that this piece of evidence was hearsay. It was held that the loss was proved on the totality of the evidence and conduct of the defendant (refer to paras. 17, 18 and 19 of the judgment of *Nanyang Union Sdn Bhd* (*supra*)). The evidence in our present case is stronger than the evidence in *Nanyang Union Sdn Bhd* (*supra*). In our case, there is ample documentary evidence to support the evidence of the loss.

[64] The civil standard of proof is on a balance of probabilities and in the instant case there is sufficient evidence to prove the loss by the defendant on such standard. In all probability, from the documentary evidence, the defendant suffered the loss of USD378,360 due to non-operation at the rig as a result of the delay in sending the conductors to Atwood Manta. The learned trial judge erred in failing to appreciate the sufficient available evidence to prove the loss of USD378,360.

Third Issue: Whether The Defendant Should Be Awarded General Damages

[65] The defendant did not seriously pursue this claim of RM500,000 in the High Court.

[66] There was no basis or rationale set out by the defendant for this claim and neither was there any evidence adduced to justify the same. Hence the learned trial judge did not err when she did not award this claim.

Conclusion

[67] We unanimously allowed the appeal in part in respect of the counterclaim. The learned trial judge had erred in concluding that the defendant had not proven the loss of USD378,360. There was sufficient evidence in the High Court that the defendant had incurred the loss due to

A the non-productive hours. In respect of the amount to be deducted, we find it difficult to interfere with the learned trial judge's findings. As far as the claim for general damages is concerned, there is no basis for us to interfere with the learned trial judge's findings in not awarding the same.

B **[68]** Therefore, judgment is entered against the plaintiff in the sum of USD378,360 with interest at the exchange rate as at 5 November 2016 at the rate of 4.298 which can be found at p. 274 of the CCB Vol. II. Costs of RM25,000 to be paid to the defendant here and below subject to allocatur and deposit refunded.

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